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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Civil Action No. 3266

TOM'S EXPRESS, INC., AND RED STAR TRANSIT COMPANY, INC.,

Plaintiffs,

vs.

DIVISION OF STATE HIGHWAY PATROL, DEPARTMENT OF HIGHWAYS, STATE OF OHIO,

Defendant

STATEMENT AS TO JURISDICTION

Statutory Provisions Sustaining Jurisdiction

This appeal is from a final decree and order of the Three-Judge Court convened in the Southern District of Ohio, Eastern Division, in accordance with the provisions of U. S. Code, Title 28, Sections 2281 and 2284, by which said Court upheld the validity of a statute of the State of Ohio, dissolved and terminated a temporary restraining order theretofore issued, and denied the petitions of plaintiffs for an order permanently restraining and enjoining the operation, execution, and enforcement of said statute in so far as it applies or purports to apply to vehicles used by plaintiffs, upon and over the highways of the State of Ohio, in their

operations as motor carriers (as defined in U. S. Code, Title 49, Section 303) under the jurisdiction and regulation of the Interstate Commerce Commission as set forth in U. S. Code, Title 49, Sections 301-328.

The Supreme Court of the United States has jurisdiction upon direct appeal to review said final decree and order by virtue of U. S. Code, Title 28, Section 1253 which provides as follows:

> "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required to be heard and determined by a district court of three judges."

Cases Believed to Sustain Jurisdiction

Cases believed to sustain the jurisdiction of the Supreme Court of the United States are *Clark* v. *Poor*, 274 U. S. 554, *Query* v. *United States*, 316 U. S. 486, and *Toomer* v. *Witsell*, 334 U. S. 385, *South Carolina* v. *Barnwell*, 303 U. S. 177.

State Statute—the Validity of Which Is Involved

The state statute, the validity of which is at issue in this appeal, is Section 7250-3, General Code of Ohio, which provides as follows:

> "No person shall drive or operate or cause to be driven or operated, any commercial car, trailer or semi-trailer, used for the transportation of goods or property, the gross weight of which, with load, exceeds three tons, upon the public highways, streets, bridges and culverts within the state of Ohio or any subdivision thereof, unless such vehicle is equipped with suitable metal protectors or substantial flexible flaps on the rear-most wheels of such vehicle or combination of vehicles to prevent as far as practicable such wheels from throwing dirt, water or other materials on the

windshields of following vehicles; such protectors or flaps shall have a ground clearance of not more than one-fifth of the distance from the center of the rearmost axle to the center of the flaps under any conditions of loading of the motor vehicle, shall be at least as wide as the tires they are protecting; provided, however, that if the motor vehicle is so designed and constructed that the above requirements are accomplished by means of fenders, body construction or other means of enclosure, then no such protectors or flaps shall be required; and further provided that rear wheels not covered at the top by fenders, bodies or other parts of the vehicle shall be covered at the top by protective means extending at least to the center line of the rearmost axle.

"Any person found guilty of a violation of this section shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than twenty-five dollars."

Date of Decree and Order to Be Reviewed and Date of Presentation of Petition for Appeal

The decree and order of the Three-Judge Court convened in the Southern District of Ohio, Eastern Division, from which this appeal is taken, was made and entered on February 20, 1952.

Plaintiffs' petition for appeal was this day, March 21, 1952, presented to the District Court of the United States for the Southern District of Ohio, Eastern Division.

Nature of the Case and Substantial Nature of Questions Involved

This action is one to restrain and enjoin the operation and execution of Section 7250-3, General Code of Ohio, hereinbefore set forth, and to restrain and enjoin its enforcement by the Division of State Highway Patrol, Department of Highways, State of Ohio, in so far as the provisions of said

statute apply or purport to apply to vehicles used, exclusively in interstate commerce, upon and over the highways, streets, bridges, and culverts within the State of Ohio by a motor carrier (as defined in U. S. Code, Title 49, Section 303) operating under the jurisdiction and regulation of the Interstate Commerce Commission, as set forth in U. S. Code, Title 49, Sections 301-328.

Each plaintiff in this action is a corporation; is a "motor carrier" as defined in Section 203(a)(16) of Part II of the Interstate Commerce Act (U. S. Code, Title 49, Section 303); is a "common carrier by motor vehicle" as defined in Section 203(a)(14) of Part II of the Interstate Commerce Act (U. S. Code, Title 49, Section 303); and operates, as such, exclusively in interstate commerce upon and over the public highways, streets, bridges, and culverts within the State of Ohio, and upon and over the highways of other states, under a certificate of public convenience and necessity issued by the Interstate Commerce Commission as provided in Sections 206 and 207 of Part II of the Interstate Commerce Act (U. S. Code, Title 49, Sections 306 and 307).

Defendant in this action, the Division of State Highway Patrol, is the enforcement agency of the Department of Highways, State of Ohio, vested with the authority and charged with the duty, by virtue of Sections 1183 and 1183-2, General Code of Ohio, of enforcing the provisions of the statute at issue, as well as the provisions of other statutes relating to the operation and use of vehicles upon and over the highways of said state.

Each plaintiff, in the conduct of its motor-carrier business, operates upon and over the highways, streets, bridges, and culverts within the State of Ohio, exclusively in interstate commerce, vehicles of the type subjected by the State of Ohio, through its General Assembly, to the requirements of Section 7250-3, General Code of Ohio. Said vehicles are

presently subjected to, and are equipped in accordance with, regulations of the Interstate Commerce Commission, issued and made effective by said commission under authority of Sections 201-228 of Part II of the Interstate Commerce Act (U. S. Code, Title 49, Sections 301-328, particularly Section 304) which prescribe, among other things, the equipment, parts, and accessories to be attached to vehicles operated under the jurisdiction of said commission (Motor Carrier Safety Regulations, Revised, Ex Parte MC-2, MC-3, MC-4, and MC-13). The aforesaid regulations of the Interstate Commerce Commission do not presently require that there be attached to vehicles operated by a motor carrier the metal protectors or flexible flaps provided for by the provisions of Section 7250-3, General Code of Ohio.

Each plaintiff offered testimony before the Three-Judge Court, predicated upon the invalidity of the Ohio statute, that the arrests threatened and contemplated by defendant, through its superintendent and highway patrolmen, if not prevented, would (a) disrupt, and destroy its investment in, its transportation business, (b) jeopardize its interstate certificate which provides that failure to render reasonably continuous and adequate service to the public, in pursuance of the authority contained therein, shall constitute sufficient grounds for the suspension, change, or revocation thereof, (c) interfere with the normal movement of interstate shipments, within the scope of its interstate operating authority, offered to it for transportation upon and over the highways, streets, bridges, and culverts within the State of Ohio, (d) divert business from it to such interstate competitors as might submit to the requirements of Section 7250-3, General Code of Ohio, and (e) compel it to terminate its use of the highways of the State of Ohio or, in the alternative, to defend itself in a multiplicity of cases instituted by de-

fendant to enforce the provisions of Section 7250-3, General Code of Ohio.

The provisions of Part II of the Interstate Commerce Act (U. S. Code, Title 49, Sections 301-328), as related to this action, are these:

"Section 202. (U. S. Code, Title 49, Section 302)

(a) The provisions of this part apply to the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce and to the procurement of and the provision of facilities for such transportation, *and the regulation of such transportation, and of the procurement thereof, and the provision of facilities therefor, is hereby vested in the Interstate Commerce Commission.*

(b) Nothing in this part shall be construed to affect the *powers of taxation* of the several States or to authorize a motor carrier to do an intrastate business on the highways of any State, or to interfere with the exclusive exercise by each State of the *power of regulation of intrastate commerce* by motor carriers on the highways thereof.

• • • • • • •

"Section 203. (U. S. Code, Title 49, Section 303)

(a) As used in this part—

• • • • • • •

(19) The *"services"* and *"transportation"* to which this part applies include all *vehicles* operated by, for, or in the interest of any motor carrier irrespective of ownership or of contract, express or implied, *together with all facilities and property* operated or controlled by any such carrier or carriers and *used in the transportation of passengers or property* in interstate or foreign commerce *or in the performance of any service* in connection therewith.

"Section 204. (U. S. Code, Title 49, Section 304)

(a) It shall be the duty of the Commission—

(1) To regulate common carriers by motor vehicle as provided in this part, and to that end the Commission may *establish reasonable requirements with respect to* continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and *safety of operation and equipment.*

* * * * * * *

(5) For the purpose of carrying out the provisions pertaining to safety, the Commission may avail itself of the assistance of any of the several research agencies of the Federal Government having special knowledge of any such matter, to conduct such scientific and technical researches, investigations, and tests as may be necessary to promote the safety of operation and *equipment of motor vehicles* as provided in this part; * * *.

The Ohio statute at issue is one pertaining to safety equipment of motor vehicles—the subject dealt with in the Motor Carrier Safety Regulations (Ex Parte MC-2, MC-3, MC-4, and MC-13) prescribed by the Interstate Commerce Commission under Section 204 of Part II of the Interstate Commerce Act (U. S. Code, Title 49, Section 304). The statute is not one pertaining to "sizes and weight" of vehicles as contemplated in Section 226 of Part II of the Interstate Commerce Act (U. S. Code, Title 49, Sections 325) which provides as follows:

"The Commission is hereby authorized to *investigate and report* on the need for Federal regulation of the *sizes and weight* of motor vehicles and combinations of motor vehicles and of the qualifications and maximum hours of service of employees of all motor carriers and private carriers of property by motor vehicle; * * *"

Each plaintiff contends that the requirement of the Ohio statute is invalid as applied to vehicles which it uses, exclusively in interstate commerce, under the jurisdiction of the Interstate Commerce Commission—vehicles fully equipped with the parts, accessories, and devices prescribed in the aforesaid safety-equipment regulations of the Interstate Commerce Commission.

Each plaintiff contends that when Congress occupied the safety-equipment field of legislation, the diversity of the state requirements then constituted a serious interference with the transportation of shipments by motor carriers across state lines, and that the legislative history of Section 204 of Part II of the Interstate Commerce Act (U. S. Code, Title 47, Section 304) discloses that the principal objective of Congress was to formulate (through the Interstate Commerce Commission) a set of safety-equipment regulations of uniform and nationwide application to put to an end the operating hardships caused by the then-prevailing diversity of the state statutes. Support for such contention is found in *The Congressional Record-Senate,* Volume 79, Part 5, Pages 5735-5737, Seventy-Fourth Congress, for April 16, 1935; the underlying reports of the *Interstate Commerce Commission* in 178 I. C. C. 539 (582, 583) and 182 I. C. C. 263-430; the *Report of Federal Coordinator of Transportation,* Senate Document No. 152, Seventy-third Congress, Second Session; and the *Report of Committee on Interstate Commerce, United States Senate,* Seventy-fourth Congress, First Session, with respect to S. 1629.

Each plaintiff contends that the Interstate Commerce Commission, by virtue of Section 204 of Part II of the Interstate Commerce Act (U. S. Code, Title 49, Section 304), was given, and now possesses, the sole power to prescribe the parts, accessories, devices, and appliances to be attached to vehicles operated by a motor carrier, exclusively in interstate commerce, and that the safety-equipment

regulations of the Interstate Commerce Commission (Motor Carrier Safety Regulations) operate to bar the states from that field of regulatory legislation.

Each plaintiff contends that the states are without power to legislate in the field of interstate commerce for the purpose of supplementing the set of safety-equipment regulations prescribed by the Interstate Commerce Commission, for the reason that such power was deliberately and expressly taken from the states by Congress, effective upon the adoption of the Motor Carrier Safety Regulations by the Interstate Commerce Commission under the provisions of Section 204, of Part II of the Interstate Commerce Act (U. S. Code, Title 49, Section 304).

Each plaintiff contends, finally, that the General Assembly of the State of Ohio exceeded its power in this instance, and that Section 7250-3, General Code of Ohio, as it applies or purports to apply to vehicles used in its motor-carrier business, exclusively in interstate commerce, under the jurisdiction of the Interstate Commerce Commission, is invalid and repugnant to the Constitution of the United States (Article I, Section 8, and Article VI) and the Acts of Congress (U. S. Code, Title 49, Sections 301-328).

Defendant in this action contends that the requirement of the Ohio statute at issue represents a proper exercise of the state's police power—a power which it claims was not affected by Part II of the Interstate Commerce Act (U. S. Code Title 49, Sections 301-328) or the adoption of regulations thereunder by the Interstate Commerce Commission.

The issue in this action, therefore, is this: Whether or not the Motor Carrier Safety Regulations of the Interstate Commerce Commission operate to invalidate the requirement contained in Section 7250-3, General Code of Ohio, as applied to vehicles operated by a motor carrier, exclusively in interstate commerce, under the jurisdiction of the Interstate Commerce Commission.

In passing upon said issue, the Three-Judge Court found for defendant, and, in an exceptionally precise manner, based its decree and order of February 20, 1952 upon the authority of two cases: *Atlantic Coast Line Railroad Company* v. *State of Georgia*, 234 U. S. 280, and *Kelly* v. *State of Washington*, 302 U. S. 1.

The memorandum which was filed by the Three-Judge Court with its decree and order contains the following findings and conclusion which are the basis for this appeal:

• • • • • • •

"3. That weather conditions in the State of Ohio cause Ohio roads to be wet and dirty for a substantial portion of each year.

"4. That no legislation by Congress or regulations of the Interstate Commerce Commission requires motor carriers travelling in interstate commerce through the State of Ohio to make any provisions to prevent rear wheels of their vehicles from throwing dirt, water or other material on the windshields of the following vehicles.

• • • • • • •

"3. That Section 7250-3 of the General Code of Ohio is a valid exercise of the police power by the State of Ohio. This Act does not conflict with or overlap any Act of the Congress of the United States or any regulation of the Interstate Commerce Commission. The federal government has not preempted the field of motor carrier regulations in connection with mud guards."

The decree and memorandum of the Three-Judge Court, made and entered on February 20, 1952, is appended hereto.

In basing its decree and order upon the two cases cited, the Three-Judge Court rejected the proposition that Congress intended, when it enacted the Motor Carrier Act, 1935 (Senate Bill 1629), now Part II of the Interstate Commerce

Act, as amended, that there be nationwide uniformity with respect to the equipment of motor vehicles operated in interstate commerce by motor carriers.

With the matter of "uniformity" in mind, the case of *Atlantic Coast Line Railroad Company* v. *State of Georgia*, 234 U. S. 280, is not decisive of the issue raised in this appeal because, in that case, Congress had not empowered the Interstate Commerce Commission to adopt a *set* of regulations to replace the diverse regulations of the states. The authority which the Interstate Commerce Commission then had as to headlights and other appliances not specifically provided for in the Acts of Congress was to "investigate and report"—the type of restricted authority it now has with respect to "sizes and weight" of vehicles operated by motor carriers (Section 226, Part II of the Interstate Commerce Act — U. S. Code, Title 49, Section 325).

It is respectfully urged, also, that the case of *Kelly* v. *State of Washington*, 302 U. S. 1, is not decisive because the state statute at issue in said case was one requiring "inspection;" it was not a statute requiring the installation of an appliance or accessory of the type required by the Ohio statute at issue in this appeal. Even in that case, the Supreme Court of the United States cautioned that the need for uniformity of regulation is a decisive consideration in every case, and that whether or not "the State in a particular matter goes too far must be left to be determined when the precise question arises."

In this appeal, it can be shown the Supreme Court of the United States that Congress, very deliberately and expressly, rejected the proposition (advocated by the state commissions at the time it considered the legislation in question) that the power of the Interstate Commerce Commission with respect to safety devices and appliances should be shared with the states. It can be shown, also, that Con-

gress decided, over the objection of the states, that the lack of uniformity of safety-equipment requirements called for its exclusive occupancy of that legislative field.

It can be shown, also, that the reasoning in the following cases, among others, supports the position taken by these plaintiffs: *Napier* v. *Atlantic Coast Line Railroad Company; Chicago & Northwestern Railroad Company* v. *Railroad Commission of Wisconsin, and Chicago, Milwaukee & St. Paul Railway Company* v. *Railroad Commission of Wisconsin,* 272 U. S. 605; *Charleston & Western Carolina Railway Company* v. *Varnville Furniture Company,* 237 U. S. 597-604; *Adams Express Company* v. *Croninger,* 226 U. S. 491-513; *Southern Railway Company* v. *Reid,* 222 U. S. 424-444; *Southern Railway Company* v. *Railroad Commission of Indiana,* 236 U. S. 439; *Pennsylvania Railroad* v. *Public Service Commission,* 250 U. S. 566; *Welch* v. *New Hampshire,* 306 U. S. 79; *Maurer* v. *Hamilton,* 309 U. S. 598; *Missouri Pac. R. Co.* v. *Porter,* 273 U. S. 341, and *California* v. *Zook and Craig,* 69 Sup. Ct. 841.

The last-cited case, *California* v. *Zook and Craig,* was decided on April 25, 1949, and it is taken as representing the current thinking of the Supreme Court of the United States. While there was a difference of opinion in said case as to the precise matter then under consideration, there was accord with respect to the necessity of applying differently-based reasoning to legislation enacted for the purpose of displacing variegated state requirements with a set of uniform standards.

The question raised by this appeal is of a substantial nature in that the decree and order of the Three-Judge Court, made and entered on February 20, 1952, may be taken by the State of Ohio and by other states as license to revive their prior policy and program of independent action in the field of legislation pertaining to devices, appliances,

and equipment of vehicles operated by motor carriers in interstate commerce, thus nullifying Congressional intent and precluding the formulation of a set of regulations and standards of nationwide application, and creating, once again, the interference and hardships caused by diverse and variegated statutes of the forty-eight states.

Facing the prospect of being subjected to a great number of statutes of like kind, enacted in Ohio and in other states, the matter at issue in this case has nationwide implications, and it is of the greatest importance to these plaintiffs and to the entire motor-carrier industry that the Supreme Court of the United States review the decree and order of the Three-Judge Court from which this appeal is taken.

Respectfully submitted,

(S.) TAYLOR C. BURNESON,

(S.) J. E. SIMPSON,

Attorneys for Plaintiffs.

March 21, 1952.

APPENDIX "A"

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

Filed Feb. 20, 1952 Howard E. Parker, Clerk

Civil Action No. 3266

TOM'S EXPRESS, INC., Weirton, West Virginia, *Plaintiff*,

vs.

DIVISION OF STATE HIGHWAY PATROL, DEPARTMENT OF HIGHWAYS, STATE OF OHIO, Columbus, Ohio, *Defendant*

DECREE

Allen, Circuit Judge; Underwood and Druffel, District Judges

This cause came on to be heard on the merits, on the pleadings, the evidence, and the briefs and arguments of counsel. The Court, upon consideration thereof, and upon authority of Atlantic Coast Line Railroad Company v. State of Georgia, 234 U. S. 280, and Kelly, Director, et al. v. Washington ex rel. Foss Co., 302 U. S. 1, finds in favor of the defendant and against the plaintiff.

Wherefore, it is hereby ordered, adjudged and decreed:

(1) That the defendant's motion to dismiss be, and it hereby is overruled, to which ruling defendant excepts.

(2) That plaintiff's prayer for a permanent injunction be, and it hereby is denied, to which plaintiff excepts.

(3) That the temporary restraining order heretofore granted herein be, and it hereby is dissolved and terminated, to which plaintiff excepts.

(4) That the complaint herein be, and it hereby is dismissed, on the merits, at plaintiff's costs, to which plaintiff excepts. Findings of Fact and Conclusions of Law are attached hereto.

(S.) FLORENCE E. ALLEN
(S.) MELL G. UNDERWOOD
(S.) JOHN H. DRUFFEL

APPENDIX "B"

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

Filed Feb. 20, 1952 Howard E. Parker, Clerk

Civil No. 3266

TOM'S EXPRESS, INC., *Plaintiff*,

vs.

DIVISION OF STATE HIGHWAY PATROL, DEPARTMENT OF HIGHWAYS, STATE OF OHIO, *Defendant*

MEMORANDUM

This is an action wherein plaintiff seeks an adjudication that Section 7250-3 of the General Code of Ohio, which section requires that freight trailers and commercial cars weighing three tons or more be equipped with metal protectors or flexible flaps on the rear-most wheels, be declared invalid, unconstitutional and inoperative and that its enforcement be enjoined as it applies or purports to apply to vehicles operated by the plaintiff exclusively in interstate commerce.

The District Court issued a temporary restraining order enjoining the enforcement of Section 2750-3 of the General Code of Ohio. On November 30, 1951 a three-judge court was convened in accordance with provisions of Title 28, Section 2284, U. S. Code. At the opening of the hearing on that date Red Star Transit Company, Inc. was permitted to intervene as a party-plaintiff.

The Court having carefully considered the evidence and being fully advised in the premises, makes the following Findings of Fact and Conclusions of Law.

Findings of Fact

1. That Section 7250-3 of the General Code of Ohio provides:

> "No person shall drive or operate or cause to be driven or operated, any commercial car, trailer or semi-trailer, used for the transportation of goods or property, the gross weight of which, with load, exceeds three tons, upon the public highways, streets, bridges, and culverts within the state of Ohio or any subdivision thereof, unless such vehicle is equipped with suitable metal protectors or substantial flexible flaps on the rear-most wheels of such vehicle or combination of vehicles to prevent as far as practicable such wheels from throwing dirt, water or other materials on the windshields of following vehicles; such protectors or flaps shall have a ground clearance of not more than one-fifth of the distance from the center of the rear-most axle to the center of the flaps under any conditions of loading of the motor vehicle, shall be at least as wide as the tires they are protecting; provided, however, that if the motor vehicle is so designed and constructed that the above requirements are accomplished by means of fenders, body construction or other means of enclosure, then no such protectors or flaps shall be required; and further provided that rear wheels not covered at the top by fenders, bodies or other parts of the vehicle shall be covered at the top by protective means extending at least to the center line of the rear-most axle.
>
> "Any person found guilty of a violation of this section shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than twenty-five dollars."

2. That compliance with Section 7250-3, of the General Code of Ohio for trucks used exclusively in interstate commerce would cost the plaintiff trucking companies more than Three Thousand Dollars each.

3. That weather conditions in the State of Ohio cause Ohio roads to be wet and dirty for a substantial portion of each year.

4. That no legislation by Congress or regulations of the Interstate Commerce Commission requires motor carriers travelling in interstate commerce through the State of Ohio to make any provisions to prevent rear wheels of their vehicles from throwing dirt, water or other material on the windshields of the following vehicles.

5. That plaintiffs by this action are seeking to have a statute of the State of Ohio declared invalid, unconstitutional and inoperative as it applies to vehicles operated by them exclusively in interstate commerce.

CONCLUSIONS OF LAW

1. That the matter in controversy exceeds the sum of $3,000, exclusive of interest and costs, and arises under the constitution and laws of the United States.

2. This Court has jurisdiction of the parties and the subject matter of this action.

3. That Section 7250-3 of the General Code of Ohio is a valid exercise of the police power by the State of Ohio. This Act does not conflict with or overlap any Act of the Congress of the United States or any regulation of the Interstate Commerce Commission. The federal government has not preempted the field of motor carrier regulations in connection with mud guards.

4. That the temporary restraining order issued herein should be dissolved and the action dismissed at plaintiffs' cost.

Entry accordingly.

(S.) FLORENCE E. ALLEN,
Judge, United States Court of Appeals;
(S.) MELL G. UNDERWOOD,
Judge, United States District Court;
(S.) JOHN H. DRUFFEL,
Judge, United States District Court.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 722

TOM'S EXPRESS, INC., AND RED STAR TRANSIT COMPANY, INC.,

Appellants,

vs.

DIVISION OF STATE HIGHWAY PATROL, DEPARTMENT OF HIGHWAYS, STATE OF OHIO,

---

PETITION FOR REHEARING

Now come Tom's Express, Inc. and Red Star Transit Company, Inc., appellants in this action, and respectfully

petition the Court for a rehearing with respect to the order which was entered by the Court on May 12, 1952:

> "*Per Curiam:* The appeal is dismissed for the want of a substantial federal question. Mr. Justice Reed and Mr. Justice Douglas dissent."

Appellants respectfully offer, in support of this petition, the following rfeasons as warranting a finding by the Court that the question before it is one of a substantial federal nature:

I

The Ohio statute at issue imposes upon appellants and other motor carriers *operating exclusively in interstate commerce* a requirement (held to be impractical by the Interstate Commerce Commission) that a piece of safety-equipment known as a "mudguard flap" be affixed to vehicles operated by them upon and over Ohio highways. In imposing said requirement upon *interstate* motor carriers, the state entered a field of legislation occupied by Congress. Appellants contend in this action that Congress occupied *fully* the field of regulation with respect to the parts, accessories, and devices to be attached to vehicles operated by *interstate* motor carriers. Appellants contend, also, that Congress, when it occupied such field, very *deliberately and expressly* (as set forth in the appendix to this petition) declined to share with the states its power to legislate with respect to "mudguard flaps" and other such devices. There is put to issue in this action, therefore, the validity or constitutionality of the Ohio statute as it applies or purports to apply to vehicles of appellants and other motor carriers which are operated *exclusively in interstate commerce*—vehicles which are fully equipped

with parts, accessories, and devices required by the safety-equipment regulations of the Interstate Commerce Commission.

II

The issue in this action arises under the Constitution of the United States (Article I, Section 8, and Article VI) and the Acts of Congress (U.S. Code, Title 49, Sections 301-327, particularly Sections 302, 303, and 304). It deals directly with Congressional intent and purpose when it enacted the Motor Carrier Act, 1935 (now Part II of the Interstate Commerce Act). It deals with the question considered by the Court as a substantial federal question in other cases, including these: *Napier v. Atlantic Coast Line Railroad Company*, 272 U.S. 605, *Pennsylvania Railroad v. Public Service Commission*, 250 U.S. 566, *Southern Railway Company v. Railroad Commission of Indiana*, 236 U.S. 439, *Southern Railway Company v. Reid*, 222 U.S. 424, *Charleston & Western Carolina Railway Company v. Varnville*, 237 U.S. 597, *South Carolina v. Barnwell*, 303 U.S. 177, *Maurer v. Hamilton*, 309 U.S. 598, *Welch v. New Hampshire*, 306 U.S. 79, *California v. Zook and Craig*, 69 S. Ct. 841, decided April 25, 1949, and *Buck v. California*, 72 S. Ct. 502, decided March 10, 1952.

III

When Congress entered the field of legislation with respect to motor carriers operating in interstate commerce, the diversity of the state statutes and their requirements (such as the Ohio statute and requirement at issue) constituted a serious interference with the transportation of shipments across state lines, and appellants contend in this action that the legislative history of Part II of the Inter-

state Commerce Act discloses that one of the principal objectives of Congress, in enacting such legislation, was to formulate (through the Interstate Commerce Commission) a *complete set* of safety-equipment requirements (not to be supplemented by the states) to insure *uniformity* of such requirements in the interest of an efficient transportation system on a *national* scale. The importance of considering the element of *diversity of requirements* has been dealt with by the Court in a number of recent cases, including the case of *California v. Zook and Craig*, 69 S. Ct. 841. In that case, however, the element was lacking. In this action, it is squarely before the Court.

IV

With respect to motor vehicle appliances—and there are hundreds of them—there is now developing in this nation the "crazyquilt of diversity" which was commented upon by Mr. Justice Frankfurter in the case of *California v. Zook and Craig*. The Ohio statute at issue is but one of several "mudguard flap" statutes recently enacted by the states and enforced as applicable to vehicles operated by motor carriers *exclusively in interstate commerce*. Like statutes have been enacted in Oklahoma, Pennsylvania, Minnesota, Oregon, Texas, Washington, California, Illinois, and New York. In addition, statutes have been enacted with respect to other parts and accessories of motor vehicles. In Ohio, another statute (Section 6307-38, General Code of Ohio, effective September 11, 1951) was enacted which deals with the installation of a directional signal device—another device not required by the regulations of the Interstate Commerce Commission. Such statutes, necessarily, differ in their requirements, and appellants and other motor carriers operating *exclusively in*

interstate commerce through many states are being subjected, again, to the operating difficulties which result from variegated requirements of the states—the happening of which Congress intended to prevent when it exercised in 1935 the supreme and *exclusive* power it possesses under the Constitution of the United States to regulate commerce among the states.

V

There is before the Court in this action the very serious question of what constitutes a *field* of legislation. With respect to the "mudguard flap" requirement, the Interstate Commerce Commission has *rejected* it as being impractical at this time, but Ohio has imposed it. There arises, then, this question: Is the entire field of safety-equipment legislation occupied by Congress or is each piece of safety equipment in a field of its own? And this further question arises: If the regulations of the Interstate Commerce Commission require the installation of two front marker-lights, may Ohio require three, Indiana four, and Illinois five? Today, the formulation of safety-equipment requirements is a science, and the function requires the attention of a staff of experts in the field. With the states and their subdivisions legislating with regard to the subject-matter at issue, often influenced by strictly local considerations, the *uniformity* found necessary by Congress is being effectively prevented.

VI

There is urgent need, also, for further and clarifying adjudication by the Court with respect to the *power* of a state or one of its subdivisions to *require* that motor carriers, operating *exclusively in interstate commerce*, equip their

vehicles with particular safety devices. Appellants in this action, as interstate motor carriers, operate between points in many states. The vehicles which they operate pass through hundreds of cities and other political subdivisions of such states. Each state and subdivision asserts the right and the power to legislate with respect to motor vehicle appliances and to impose its requirements upon interstate carriers operating across the nation. In a practical sense, it may be said that the states are conducting themselves as though the state-offered amendment to Part II of the Interstate Commerce Commission (set forth in the appendix to this petition) had been allowed instead of *rejected*. The practical operating problems arising from such conduct are manifold, and appellants urge that clarification of matter at issue in this action is of great importance, not only to them, but to the whole of the motor-carrier industry.

Wherefore, appellants pray that this petition for rehearing be granted; that the Court vacate its order of dismissal; and that a finding be made by the Court that there is before it in this action a substantial federal question.

TAYLOR C. BURNESON
J. E. SIMPSON
Counsel for Appellants

Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

TAYLOR C. BURNESON

APPENDIX

Supplementary Detail With Respect To Matters Contained In Petition

Provisions Of Constitution As Related To This Action

Article I, Section 8:

"The Congress shall have Power * * * To regulate Commerce * * * among the several States, * * *."

Article VI:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Part II Of The Interstate Commerce Act As Related To This Action

The provisions of Part II of the Interstate Commerce Act (U.S. Code, Title 49, Sections 301-327), as related to this action, are these:

"*Section 202. (U. S. Code, Title 49, Section 302)*

(a) The provisions of this part apply to the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce and to the procurement of and the provision of facilities for such transportation, *and the regulation of such transportation, and of the procurement thereof, and the provision of facilities therefor, is hereby vested in the Interstate Commerce Commission.*

(b) Nothing in this part shall be construed to affect the *powers of taxation* of the several States or to authorize a motor carrier to do an intrastate business

on the highways of any State, or to interfere with the exclusive exercise by each State of the *power of regulation of intrastate commerce* by motor carriers on the highways thereof.

(c) • •
(1) • •
(2) • •"

"*Section 203. (U.S. Code, Title 49, Section 303)*

(a) As used in this part—

• •

(13) The term 'motor vehicle' means any vehicle, machine, tractor, trailer, or semi-trailer propelled or drawn by mechanical power and used upon the highways in the transportation of passengers or property,

• •

• •

(16) The term 'motor carrier' includes both a common carrier by motor vehicle and a contract carrier by motor vehicle.

• •

(19) The 'services' and 'transportation' to which this part applies include all *vehicles* operated by, for, or in the interest of any motor carrier irrespective of ownership or of contract, express or implied, *together with all facilities and property* operated or controlled by any such carrier or carriers and *used in the transportation of passengers or property* in interstate or foreign commerce *or in the performance of any service* in connection therewith."

"*Section 204. (U.S. Code, Title 49, Section 304)*

(a) It shall be the duty of the Commission—

(1) To regulate common carriers by motor vehicle as provided in this part, and to that end the Commission may *establish reasonable requirements with respect to* continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and *safety of operation and equipment.*

(2) • •
(3) • •

(4) * *

(4a) To determine, * * whether the transportation in interstate or foreign commerce performed by any motor carrier * * is * * of such nature * * *as not substantially to affect or impair uniform regulation* by the Commission *of transportation* by motor carriers engaged in interstate or foreign commerce *in effectuating the national transportation policy declared in this Act.*

(5) For the purpose of carrying out the provisions pertaining to safety, the Commission may avail itself of the assistance of any of the several research agencies of the Federal Government having special knowledge of any such matter, to conduct such scientific and technical researches, investigations, and tests as may be necessary to promote the safety of operation and *equipment of motor vehicles* as provided in this part; * *."

Comment: In Section 204(a)(4a), Congress expressed, rather clearly, its intention that there be *uniform regulation* of *transportation* in effectuating Congressional policy. And in Section 204(a)(5), Congress said that when it provided for the regulation of safety of equipment, as in Section 204(a)(1), it meant to include equipment *of* vehicles—meaning the "mudguard flaps" and all other devices and appliances attached to vehicles operated under the jurisdiction of the Interstate Commerce Commission.

"*Section 226. (U.S. Code, Title 49, Section 325)*

"The Commission is hereby authorized to *investigate and report* on the need for Federal regulation of the *sizes and weight* of motor vehicles and combinations of motor vehicles and of the qualifications and maximum hours of service of employees of all motor carriers and private carriers of property by motor vehicle; * *"

Comment: The number of this section was originally 225. It was changed to 226 in 1940.

The National Transportation Policy

The National Transportation Policy (Transportation Act of 1940—U.S. Code, Title 49, notes preceding Sections 1 and 301), which underlies the entire Interstate Commerce Act, is as follows:

> "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote, safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. *All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.*"

Discussion Of Congressional Intent

As early as June 15, 1926, the Interstate Commerce Commission began an investigation of the need for regulation of motor carriers operating in interstate commerce, and, on April 10, 1928, in Docket No. 18300, *Motor Bus and Motor Truck Operation,* it issued a report with respect thereto (140 I. C. C. 685 to 760, incl.). In said report, the Commission recommended that Congress enact Federal legislation.

On October 16, 1931, in *Ex Parte No. 103,* 178 I. C. C. 539 (582, 583), the Interstate Commerce Commission again commented upon the need for Federal legislation.

On April 6, 1932, in Docket No. 23400, *Coordination of Motor Transportation,* 182 I. C. C. 263 to 430, incl., the Interstate Commerce Commission again recommended regulation by the federal government, and, with respect to the matter at issue, said this—

> "The desirability of having *uniform rules and regulations as to* widths, heights, lengths, weights, speed, lights, and *safety devices of motor vehicles* operating for hire over the public highways is generally recognized." (Page 373)
>
> • • • • • • • • • •
>
> "* * *Uniformity in such regulations seems highly desirable.* It may be well for Congress to take action to that end. This is a matter beyond our purview, but we have recommended that it be made the subject of a special and intensive investigation under authority of Congress." (Page 383)

In 1933, Commissioner Eastman was appointed Federal Coordinator of Transportation (Emergency Railroad Transportation Act, 1933), and he continued the study of transportation begun by the Interstate Commerce Commission.

On January 17, 1934, the Committee On Interstate and Foreign Commerce, House of Representatives, (Seventy-Third Congress, Second Session), began consideration of H.R. 6836, often referred to as the Rayburn Bill.

The bill did not pass, but it is brought to the Court's attention in this action for two reasons—first, because the bill is discussed in the Coordinator's report which was completed at a later date, and second, because it is important to take note of the provisions contained therein with respect to the police powers of the states.

Said provisions were as follows:

"*General Duties And Powers Of The Commission*

"Sec. 2. (a) It shall be the duty of the Commission—

"(1) To supervise and regulate common carriers by motor vehicle as provided in this Act, and to that end the Commission may establish reasonable requirements *not inconsistent with the police powers of the States,* with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

"(2) To supervise and regulate contract carriers by motor vehicle as provided in this Act, and to that end the Commission may establish reasonable requirements, *not inconsistent with the police powers of the States,* with respect to uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, safety of operation and equipment." (Page 3)

* * * * * * * * * *

"*Powers Of The States*

"Sec. 19. (a) Nothing in this Act contained shall be construed to affect the powers of taxation of the several States or to authorize a motor carrier to do an intrastate business on the highways of any State. It is not intended hereby to interfere with the exclusive exercise by each State of the power of regulation of intrastate commerce by motor carriers on the highways thereof, and notwithstanding this Act, the intrastate operations of motor carriers on the highways of a State shall continue to be subject to the laws of the State regulating such intrastate commerce. *The laws enacted in any State and regulations thereunder that relate to the maintenance, protection, safety, or use of the highways therein, which do not discriminate against motor vehicles used in interstate commerce, shall not be deemed to be a burden or an obstruction or impediment to interstate commerce, and the power to enact such laws and promulgate such regulations*

thereunder is hereby expressly recognized and confirmed to the respective States." (Page 13)

On March 10, 1934, the Federal Cordinator's report (by that time completed) was transmitted by the Interstate Commerce Commission to the President of the Senate, and it is recorded in *Senate Document 152*, Seventy-third Congress, Second Session, *Report Of Federal Coordinator Of Transportation On The Regulation Of Transportation Agencies Other Than The Railroads And On Proposed Changes In Railroad Regulation.*

In the main body of said report, the following is contained—

"*Highway and safety regulations.*—The States regulate extensively the length, width, height, and speed of motor vehicles and their maximum gross weights, and require that they be equipped with a variety of safety appliances. * * (Page 32)

* * * * * * * * * *

"The *existing lack of uniformity* and the *character of the restrictions* set up by some of the States constitute, in the opinion of some, a serious interference with the free flow of interstate commerce. *Federal action is therefore urged.*" (Page 32)

* * * * * * * * * *

"The recommendations of both studies with respect to regulation are reflected, to some extent, in the accompanying Federal motor carrier bill. *It gives the Commission authority to make reasonable requirements with respect to safety of operation and equipment.* It also authorizes the Commission to *investigate and report* on the need for Federal regulation of the *sizes and weights* of motor vehicles used in interstate and foreign operations, and of the qualifications and maximum hours of service of employees, in the case of all motor carriers, including private carriers of property." (Page 33)

"*The motor carrier bill.*—The motor carrier bill which accompanies this report in *appendix G* is based

largely on the Rayburn bill (H. R. 6836, 73d Cong., 2d sess.), now under consideration by Congress. * *

"The two bills differ in several important respects, which will be hereinafter indicated. Both propose comprehensive regulation of the common carrier, a much less comprehensive type of regulation of the contract carrier, and no regulation of the private carrier. However, section 325 of the proposed bill authorizes the Commission to investigate and report to Congress upon the need for Federal regulation of the sizes and weights of all motor vehicles operating in interstate and foreign commerce, and of the qualifications and maximum hours of service of employees, this investigation to cover private as well as for-hire carriers. The Rayburn bill contains no provision respecting these matters except that it provides for regulation of the qualifications and hours of service of the employees of common and contract carriers. While the inquiry made by the coordinator's staff indicates a possible need for these forms of Federal regulation, the subject is one which may appropriately be postponed for future consideration.

"The proposed bill is drawn to become part III of the Interstate Commerce Art. For convenience, the nature of the other differences from the Rayburn bill will be pointed out in connection with a brief section by section summary. (Page 45)

"Section 304, which defines the general powers and duties of the Commission, does not include paragraph (5) of section 2(a) of the Rayburn bill, because the latter unduly restricts the power of the Commission to issue purely administrative orders, other than as to accounts and records, without a hearing. The constitutional requirement of due process is an adequate protection for the carriers. *The phrase "not inconsistent with the police powers of the States" in subsection (a) of the Rayburn bill also is omitted, as being unduly restrictive of Federal action* in the administration of matters over which the States have jurisdiction under the police power in the absence of an assertion of Federal authority." (Page 46)

"Section 325 provides for investigation and report to Congress of the need, if any, for Federal regulation of the sizes and weights of motor vehicles and of the hours of labor of employees of all motor carriers and private carriers of property by motor vehicle. Section 304 gives the Commission authority over the safety of operation and equipment of common and contract carriers, and does section 2 of the Rayburn bill." (Page 49)

The pertinent portions of the proposed bill, attached to the report (Appendix G) were as follows:

"*General Duties And Powers Of The Commission*

"Sec. 304(a) It shall be the duty of the Commission:

"(1) To supervise and regulate common carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, and *safety of operation and equipment.*

"(2) To supervise and regulate contract carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to uniform systems of accounts, records, and reports, preservation of records, and *safety of operation and equipment.*"

"(3) To administer, execute, and enforce all other provisions of this part relative to motor carriers, to make all necessary orders in connection therewith, and to prescribe rules, regulations, and procedure for such administration; * *" (Page 352)

The following is contained in another appendix to said report—

"The Present Regulations Of The Motor Carrier Industry

"Part I

"Recent Trends In State Regulations Of Motor Carriers And Present Extent And Character Of State Regulation

* * * * * * * * * * *

"There have been many changes in the motor-carrier laws since the survey by the Interstate Commerce Commission in *Coordination of Motor Transportation* (182 I. C. C. 263, 410-413). The statutes considered in that proceeding were enacted in 1931 or earlier years. Of the common-carrier laws now in force those of 18 States and the District of Columbia were enacted prior to 1931, those of 12 States were enacted in 1931, those of 4 in 1932, and those of 13 in 1933. Only 1 State has laws relating to contract and private carriers which were enacted prior to 1931; 8 States enacted such laws in 1931, 3 in 1932, and 19 in 1933. This summary includes only those instances in which complete new legislation was enacted or very substantial modifications or amendments of earlier laws were made. In a great many other States new legislation was enacted or more or less substantial changes were made in the pre-existing laws with respect to specific matters, such as taxation, hours of labor, size and weight of vehicle, *safety requirements*, etc.

"The legislatures of 44 States were in session during 1933. Examination of the laws enacted in that year and the many which were proposed but not passed *indicates that a great variety of matters were considered, that many diverse principles of regulation were brought to bear in the consideration of legislation*, and that some of the legislation bears the earmarks of sponsorship by special interests. * *" (Page 170)

* * * * * * * * * * *

"There has also been a tendency to adopt or propose laws or revisions more in harmony with the "uniform

act" approved by the National Association of Railroad and Utilities Commissioners at its 1932 annual convention. *However, there is still a wide diversity of State regulation,* both with respect to the kinds of carriers and service regulated and the character and degree of regulation that is applied." (Page 171)

* * * * * * * * * *

"Part 4

"*State Laws And Regulations Concerning Specifications, Equipment, And Operation Of Motor Vehicles, And Public Liability Insurance.*

"The laws and regulations of the States with respect to the dimensions, weights, speed, and safety of operation in general of motor vehicles and the requirements of the States with respect to bonds and insurance have an important bearing on the character and cost of motor transportation and on the safety and convenience of the public's use of the highways. *A lack of uniformity* in such laws and regulations *tends to set up obstacles to the movement of traffic across State lines.* * *" (Page 205)

The foregoing report of the Federal Coordinator (which reached Congress while it was studying the Rayburn Bill) explains why H. R. 6836, containing the "sharing" provisions (Sections 2 and 19), was not passed by Congress.

On February 25, 1935, the Committee on Interstate Commerce, United States Senate, (Seventy-Fourth Congress, First Session), began consideration of S. 1629, a revised bill which was based upon the various investigations and studies previously made by the Interstate Commerce Commission, the Federal Coordinator of Transportation, and by Congress.

Said revised bill (S. 1629), contained these pertinent provisions:

"*Declaration Of Policy And Delegation Of Jurisdiction*

"Sec. 302. (a) * *

"(b) The provisions of this part apply to the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce and the regulation of such commerce is hereby vested in the Interstate Commerce Commission.

"(c) Nothing in this part shall be construed to affect the powers of *taxation* of the several States or to authorize a motor carrier to do an intrastate business on the highways of any State. It is not intended hereby to interfere with the exclusive exercise by each State of the power of regulation of *intrastate commerce* by motor carriers on the highways thereof, and notwithstanding this part, the intrastate operations of motor carriers on the highways of a State shall continue to be subject to the laws of the State regulating such intrastate commerce: *Provided, however,* That this shall not be construed to prevent the Commission from exercising its authority to protect persons and localities in interstate commerce against undue or unreasonable disadvantage or prejudice caused by any rate, fare, charge, classification, regulation or practice of motor carriers made or imposed by authority of any State." (Pages 1 and 2)

"*General Duties and Powers Of The Commission.*

"Sec. 304. (a) It shall be the duty of the Commission—

"(1) To supervise and regulate common carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, and *safety of operation and equipment.*

"(2) To supervise and regulate contract carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to uniform systems of accounts, records, and reports, preservation of records, and *safety of operation and equipment.*

"(3) To supervise and regulate motor carrier transportation brokers as provided in this part, and to that end the Commission may establish reasonable require-

ments with respect of licensing, financial responsibility, accounts, records, reports, operations, and practices of any such person or persons.

"(4) For the purpose of carrying out the provisions pertaining to safety, the Commission may avail itself of the assistance of any of the several existing research agencies of the Federal Government having special knowledge of any such matter, to conduct such scientific and technical researches, investigations, and tests as may be necessary to promote the safety of operation and *equipment of motor vehicles* as provided in this part; the Commission may transfer to such agency or agencies such funds as may be necessary and available to make this provision effective.

"(5) To administer, execute, and enforce all other provisions of this part, to make all necessary orders in connection therewith, and to prescribe rules, regulations, and procedure for such administration; and * *" (Page 3)

* * * * * * * * * *

"Investigation Of Motor Vehicle Sizes, Weights, And So Forth

"Sec. 325. The Commission is hereby authorized to *investigate and report* on the need for Federal regulation of the *sizes and weight* of motor vehicles and combinations of motor vehicles and of the qualifications and maximum hours of service of employees of all motor carriers and private carriers of property by motor carriers and private carriers of property by motor vehicle; and in such investigation the Commission shall avail itself of the assistance of all departments or bureaus of the Government having special knowledge of any such matter. * *" (Page 17)

During the hearing before the Senate Committee, its Chairman removed all doubt about the Committee's thinking with respect to the matter of uniformity, and this is what he said in that connection:

"The Chairman. *The purpose of passing the bill is to have uniform laws with reference to interstate commerce. That was the purpose, or one of the pur-*

poses, of the Interstate Commerce Act, with reference to railroads. Various States were passing laws affecting interstate commerce, and one of the reasons that the Interstate Commerce Commission was created was for the purpose of making uniform regulations with reference to transportation in interstate commerce." (Page 91)

With respect to the power of the states, dealt with in Section 302, the report discloses this:

"Mr. Benton. Mr. Chairman and gentlemen, my name is John E. Benton. I am the general solicitor of the National Association of Railroad and Utilities Commissioners." (Page 163)

* * * * * * * * * *

"I will ask, Mr. Chairman, if I may present the amendments to the reporter and have them incorporated at this point in my statement, as if read, and then I will proceed to discuss them. May that be done?

"The Chairman. Yes.

"(The statement referred to is as follows:)

"*Amendments Proposed To S. 1629 By The State Commissions Represented Through The National Association Of Railroad And Utilities Commissioners*

"Amend section 302(c) by striking out all of lines 7 to 12, inclusive, on page 3 of the bill as printed, and inserting in place thereof the following:

"That the laws enacted in any State and regulations thereunder that relate to the maintenance, protection, safety, or use of the highways therein, which do not discriminate against motor vehicles used in interstate commerce, shall not be deemed to be a burden or an obstruction or impediment to interstate commerce, and the power to enact such laws and promulgate such regulations thereunder is hereby expressly recognized and confirmed to the respective States:

"*Provided further*, That transportation of persons or property by motor vehicle between points in the same State through territory outside thereof by reason

of its local character is left subject to the regulation of the State within which such transportation takes place." (Page 165)

The amendment was rejected by the Committee.

On April 16, 1935, Senate Bill 1629, which subsequently was enacted into law as the Motor Carrier Act, 1935 (now Part II of the Interstate Commerce Act) was on the floor of the Senate, recommended for passage by the Senate Committee on Interstate Commerce. With respect to Section 302 pertaining to the powers not taken from the states —(to tax and to regulate intrastate commerce), the amendment rejected by the Committee was again offered, and the following is the official record of the action taken:

The Congressional Record—Senate, Volume 79, Part 5, Pages 5735-5737, 74th Congress, 1st Session, for April 16, 1935:

"*Regulation Of Interstate Traffic By Motor Carriers*

"The Senate resumed consideration of the bill (S. 1629) to amend the Interstate Commerce Act, as amended, by providing for the regulation of the transportation of passengers and property by motor carriers operating in interstate or foreign service, and for other purposes. (Page 5735)

* * * * * * * * * *

"Mr. Duffy. Mr. President, I offer the amendment which I sent to the desk.

"The Vice-President. The amendment will be stated.

"The Chief Clerk. On page 3, after line 12, it is proposed to strike out down to line 5 on page 4 and in lieu thereof to insert the following:

(c) Nothing in this part shall be construed to affect the powers of taxation of the several States or to authorize a motor carrier to do an intrastate business on the highways of any State. It is not intended hereby to interfere with the exclusive exercise by each State of the power of regulation of intrastate com-

merce by motor carriers on the highways thereof; and notwithstanding this part, the intrastate operations of motor carriers on the highways of a State shall continue to be subject to the laws of the State regulating such intrastate commerce: *Provided, however, That the laws enacted in any State and regulations thereunder that relate to the maintenance, protection, safety, or use of the highways therein,* which do not discriminate motor vehicles used in interstate commerce, *shall not be deemed to be a burden on or an obstruction or impediment to interstate commerce, and the power to enact such laws and promulgate such regulations thereunder is hereby expressly recognized and confirmed to the respective States*: Provided further, That transportation of persons or property by motor vehicle between points in the same State through territory outised thereof by reason of its local character is left subject to the regulation of the State within which such transportation takes place.

"Mr. Duffy: Mr. President, the National Association of Railroad and Utility Commissioners is an organization which represents 46 of the State commissions, which largely have to do with the regulating of bus and motor-truck transportation. This proposed amendment was submitted by me at the request of the representatives of these various State regulatory bodies. The amendment was submitted to the Committee on Interstate Commerce, and I have before me the hearings of that committee. (Page 5735)

* * * * * * * * * *

"I do not intend to take the time of the Senate any more than to present the viewpoint of the various State commissions which have been in the business of motor-truck regulation and understand that subject. I submit that this amendment should be adopted. *It would reserve to the various State commissions the power they now have, and which clearly would be taken away under this bill if it should be passed* in the language in which the committee has reported it to the Senate." (Page 5736)

* * * * * * * * * *

"Mr. Wheeler. In my judgment *the language of the amendment* offered by the Senator from Wisconsin is somewhat unfortunate, because it covers several different matters, and it is my opinion that his amendment as worded would not only reach the Shreveport case but it might seriously hamper the Commission in fixing and regulating the hours of service, or it *might seriously interfere with the safety provisions included in the bill at the present time.* In my judgment, therefore, it would be unfortunate if the amendment should be adopted." (Page 5737)

• • • • • • • • • •

"The President pro tempore. The question is on agreeing to the amendment offered by the Senator from Wisconsin (Mr. Duffy).

"On a division, *the amendment was rejected.* (Page 5737).

At that time, it must have been clear to everyone, including the states, that Congress has expressly *rejected* the idea of sharing with Ohio or any other state its power (through the Interstate Commerce Commission) to prescribe safety equipment to be attached to trucks, tractors, trailers, and semi-trailers operated exclusively in interstate commerce under the jurisdiction of the Interstate Commerce Commission.

After a span of almost seventeen years, however, Ohio and other states have apparently lost sight of their legislative limitations (imposed by Congress) with respect to the type of requirement at issue in this action.

In the House of Representatives nothing could be found by way of amendment or other action which affected the issue in this action.

Decisions In Point

In the cases of *Napier v. Atlantic Coast Line Railroad Company, Chicago & Northwestern Railroad Company v. Railroad Commission of Wisconsin,* and *Chicago, Milwaukee & St. Paul Railway Company v. Railroad Commission of Wisconsin,* 272 U.S. 605, decided November 29, 1926, the question was this—Did the Federal Locomotive Boiler Inspection Act, as amended, occupy the field of regulating locomotive equipment to the extent of precluding state legislation with respect to such equipment used in interstate commerce?

The Court in said cases had before it a Georgia statute prescribing an automatic door to the fire box, and a Wisconsin commission order prescribing a cab curtain. At the time, Congress had delegated to the Interstate Commerce Commission the power to prescribe regulations with respect to locomotives and the parts thereof, and the regulations of the Interstate Commerce Commission then in effect dealt with steam gauges, safety valves, water glass and gauge cocks, shut-off and drain cocks, shields on water and lubricator glasses, lamps in connection with water glasses, particular types of ash pans, "clear vision" windows in cabs, cylinder cocks, sanding apparatus, whistles, safety bars and chains, chafing irons, headlights with designated intensity and devices, classification lamps, cab lights, and safety valves for oil supply pipes.

However, there were no regulations with respect to any particular type of fire box door (the Georgia statute) or cab curtain (the Wisconsin order).

The Supreme Court of the United States held that the Georgia statute and the Wisconsin commission order were *invalid,* saying—

"The requirements here in question are, in their nature, *within the scope of the authority delegated to the commission.*

* * * * * * * * * * *

"The federal and the state statutes are directed to the same subject—the equipment of locomotives. They operate upon the same object. It is suggested that the power delegated to the commission has been exerted only in respect to minor changes or additions. But this, if true, is not of legal significance. It is also urged that, even if the commission has power to prescribe an automatic fire box door and a cab curtain, it has not done so; and that it has made no other requirement inconsistent with the state legislation. This, also, if true, is without legal significance. *The fact that the commission has not seen fit to exercise its authority to the full extent conferred, has no bearing upon the construction of the act delegating the power.*

"We held that state legislation is precluded, because the Boiler Inspection Act, as we construe it, was intended to occupy the field. The broad scope of the authority conferred upon the commission leads to that conclusion. *Because the standard set by the commission must prevail, requirements by the states are precluded,* however commendable or however different their purpose."

In the case of *Pennsylvania Railroad v. Public Service Commission,* 250 U.S. 566, decided November 10, 1919, the last car of an interstate train operated by the railroad was not equipped with a *platform, guard rails, and steps,* as required by a Pennsylvania statute. The railroad contended that the statute was invalid because the Interstate Commerce Commission had been given exclusive power by Congress under the Safety Appliance Act to prescribe equipment of that type.

The Supreme Court of the United States held that the statute was *invalid,* saying—

"* * when the United States has exercised its exclusive powers over interstate commerce so far as to

take possession of the field, the states no more can *supplement* its requirements than they can annul them. * *

"In the present instance the rules for the construction of mail cars, admitted to be valid, not only exclude the wide platform, but provide an equipment for them when used as end cars. The Safety Appliance Act, with its careful requirements for the safety of the men, was followed by most elaborate regulations issued by the Interstate Commerce Commission which include three large pages of prescriptions for 'caboose cars without platforms.' Caboose cars, constantly are used as end cars, and these pages, like the Post-office order as to mail cars, recognize the lawfulness of end cars such as the Pennsylvania statute forbids.

"The question whether Congress and its commissions acting under it have so far exercised the exclusive jurisdiction that belongs to it as to exclude the state must be answered by a judgment upon the particular case. *The subject-matter in this instance is peculiarly one that calls for uniform law, and in our opinion regulation by the paramount authority has gone so far that the statute of Pennsylvania cannot impose the additional obligation at issue here.* The Interstate Commerce Commission is continually on the alert, and if the Pennsylvania law represents a real necessity, no doubt will take or recommend steps to meet the need."

In the case of *Southern Railway Company v. Railroad Commission of Indiana,* 236 U.S. 439, decided February 23, 1915, the railroad operated, in interstate commerce, a car not equipped with *grab irons* and *hand holds,* as required by an Indiana statute. Said equipment was required, also, by a regulation of the Interstate Commerce Commission. The railroad—prosecuted under the Indiana statute—questioned the validity of the statute.

The Supreme Court of the United States held that the statute was *invalid*, saying—

"* * Congress, in the exercise of its power to regulate interstate commerce, *has legislated as to the appliances with which certain instrumentalities of that commerce must be furnished* in order to secure the safety of employees. Until Congress entered that field, the States could legislate as to equipment in such manner as to incidentally affect, without burdening, interstate commerce. But Congress could pass the Safety Appliance Act only because of the fact that the equipment of cars moving on interstate roads was a regulation of interstate commerce. Under the Constitution the nature of that power is such that, when exercised, it is exclusive, and *ipso facto* supersedes existing state legislation on the same subject. Congress, of course, could have 'circumscribed its regulations' so as to occupy a limited field. * * But so far as it did legislate, the exclusive effect of the Safety Appliance Act did not relate merely to details of the statute and the penalties it imposed, but *extended to the whole subject of equipping cars with appliances* intended for the protection of employees. *The states thereafter could not legislate so as to require greater or less or different equipment;* nor could they punish by imposing greater or less or different penalties.

* * * * * * * * * *

"Without, therefore, discussing the many cases sustaining the right of the states to legislate on subjects which, while not burdening, may yet incidentally affect interstate commerce, *it is sufficient to say here that Congress has so far occupied the field of legislation relating to the equipment of freight cars with safety appliances as to supersede existing and prevent further legislation on that subject.* The principle is too well established to require argument. * *

"The test, however, is not whether the state legislation is in conflict with the details of the Federal law or supplements it, but whether the State had any jurisdiction of a subject over which Congress had exerted its exclusive control."

In the case of *Southern Railway Company v. Reid*, 222 U.S. 424-444, decided January 9, 1912, the Supreme Court of the United States considered the validity of a North Carolina statute which required the railroad to accept shipments for transportation via routing specified by the consignor. In said case, a shipment was offered to the railroad for transportation in interstate commerce. The railroad refused to accept the shipment for the reason that no rates had been published between the points in question. The railroad was prosecuted under the state statute. Congress had acted with respect to interstate rates.

The Supreme Court of the United States held that the state statute was *invalid*, and it had this to say—

> "It is well settled that if the state and Congress have a concurrent power, that of the state is superseded when the power of Congress is exercised.
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> "Manifestly one authority must be paramount, and when it speaks the other must be silent. We can see no middleground. In so deciding we take no essential power from the states. The balances of the Constitution are only preserved, and there is given to the states the power which is the states' and to Congress the power which belongs to Congress."

In the case of *Charleston & Western Carolina Railway Company v. Varnville Furniture Company*, 237 U.S. 597-604, decided June 1, 1915, the Supreme Court considered a South Carolina statute which made the "delivering" carrier responsible for damage to shipments. The Federal law made the "initial" carrier responsible, and the question was (with respect to interstate shipments) whether or not the South Carolina statute was valid.

The Supreme Court held that it was *invalid*, and it said this—

> "It is suggested that the act is in aid of interstate commerce. The state law was not contrived in aid of

the policy of Congress, but to enforce a state policy differently conceived; and the fine of $50 is enough to constitute a burden. * * But that is immaterial. *When Congress has taken the particular subject-matter in hand, coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go.* * * *The legislation is not saved by calling it an exercise of the police power,* * *"

In the case of *Welch v. New Hampshire*, 306 U.S. 79, 59 S. Ct. 438, 1 Federal Carriers Cases 654, decided January 30, 1939, the Supreme Court of the United States had before it a New Hampshire statute regulating maximum hours of service with respect to driving a vehicle upon and over New Hampshire highways—the type of regulation which the Interstate Commerce Commission had been delegated by Congress to make.

The Court found in said case that the issue dealt with a period *after* the effective date of the Motor Carrier Act, 1935, but *before* the Interstate Commerce Commission had adopted its regulations, and, for that reason, the state should prevail.

The Court then made the following statement which relates directly to the issue in this action—

"Without so deciding, we assume, so far as concerns the periods of continuous service condemned by the state commission, *that when the federal regulations take effect they will operate to supersede the challenged provisions of the state statute.*"

In the case of *South Carolina v. Barnwell*, 58 S. Ct. 510, 303 U.S. 177, 82 L.Ed. 734, 1 Federal Carriers Cases 582, decided February 14, 1938, the Supreme Court of the United States had before it a South Carolina statute regulating the *size and weight* of vehicles, and the question was

whether or not the regulatory provisions of the statute were valid as applied to vehicles operated in interstate commerce.

The court, upon consideration of Section 225 of Part II of the Interstate Commerce Act (now Section 226), held with the state, and disposed of the case with this finding—

> "* * Congress has not undertaken to regulate the *weight and size* of motor vehicles in interstate motor traffic, and has left undisturbed whatever authority in that regard the states have retained under the Constitution."

For that reason, the Court's decision may be classified with others which were predicated upon *the absence of federal legislation.* To this date, Congress has not seen fit to specify *sizes and weights* of vehicles, but it *has* legislated with respect to *safety equipment* of the type required by the state statute under consideration in this action.

In the case of *Maurer v. Hamilton,* 309 U.S. 598, 1 Federal Carriers Cases 756, decided April 22, 1940, the Supreme Court of the United States considered a Pennsylvania statute prohibiting the use of car-over-cab equipment, and the question was whether the statute was a regulation as to sizes and weights within the meaning of Section 226 (U.S. Code, Title 49, Section 325) or whether it was a safety regulation within the meaning of Section 204 (U.S. Code, Title 49, Section 304).

The Court held that the statute was a regulation of *sizes and weights,* and, for that reason (as in the South Carolina case), it was not invalidated by the rules and regulations of the Interstate Commerce Commission.

Had the statute been a regulation of the *"safety of operation and equipment"* (Section 204) having no reasonable relationship to *"sizes and weights"* (Section 226), the clear indication was that the statute would have been declared

invalid as an exercise of power which had been withdrawn from the state.

In the case of *Buck v. California*, 72 S. St. 502, decided March 10, 1952, the Supreme Court of the United States considered the validity of a county ordinance requiring a taxicab driver to obtain a driver's license or permit. Without such permit, Buck operated a taxicab through the county, and he was prosecuted under the ordinance. The passengers in the cab had been picked up in Mexico.

It was contended in the case that the county was without power to require such a license from a driver operating a cab in foreign commerce. The matter of requiring that a taxicab operator's license be obtained was not at issue, and the Court stated that it would not reach for a question not before it.

The Court, by a 5-to-4 decision, held that the requirement of the ordinance that Buck pay $1.00 per year for a driver's permit and meet the general "proper party" qualifications imposed was a valid requirement.

It was pointed out in that case that Congress had given to the Interstate Commerce Commission very limited power with respect to taxicabs and taxicab drivers, and that the qualifications exacted by the ordinance were not in conflict with the requirements of said commission dealing with drivers.

The Court emphasized, also, that the operation was "essentially local," and, for that reason, "Congress has left the field largely to the States." The question of *diversity of requirements* and its effect upon motor carriers operating through many states was not present in said case and was not passed upon.

In the case of *California v. Zook and Craig*, 69 Sup. Ct. 841, 7 Federal Carriers Cases 2094, decided April 25, 1949,

the Supreme Court of the United States considered the validity of a California statute which prohibited Zook and Craig, operators of a travel bureau, from arranging for transportation of persons except via carriers operating under certificates issued by the Public Service Commission of California *or by the Interstate Commerce Commission.*

In violation of said statute, and in violation of a similar section (211) of Part II of the Interstate Commerce Act, said parties arranged for transportation via a non-certificated carrier from a point in California to a point in Texas, and, although the transportation arranged by them was in interstate commerce, they were prosecuted under the state statute.

The question for determination was whether or not the state, as well as federal government, could *punish* them for such act. By a 5-to-4 decision, the Court held that it could, but it took particular pains, by making the following clarifying statements, to confine its decision to definite limits—

> "The case would be different if there were conflict in the provisions of the federal and California statutes. But there is no conflict in terms, and no possibility of such conflict, for the state statute makes federal law its own in this particular. The case might also be different were there variegated state laws on this subject in 1941, when the I.C.C. removed the federal exemption. *We might then infer congressional purpose to displace local laws and establish a uniform rule beyond which the states may not go.*"
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> "But this case concerns only the state's mechanisms for enforcing a statute identical with that of the federal government, though rooted in different policy considerations."

The Court's majority opinion in said case was written by Mr. Justice Murphy, and he was joined by Mr. Chief Justice

Vinson, Mr. Justice Reed, Mr. Justice Rutledge, and Mr. Justice Black. A dissenting opinion was written by Mr. Justice Burton, and he was joined by Mr. Justice Douglas and Mr. Justice Jackson. Another dissenting opinion was written by Mr. Justice Frankfurter.

Mr. Justice Burton, in his dissenting opinion, discussed the subject of conflict between state and federal jurisdiction in the field of motor-carrier regulation, and, in considerable detail, he dealt with the provisions of Part II of the Interstate Commerce Act and their effect upon state regulatory power.

In that regard, the following portions of his opinion are particularly pertinent to the issue in this action—

> "We start not merely with the inherent right of a state to exercise its police power over acts within its jurisdiction. We start also with the constitutional provisions by which the supreme legislative power of the respective states has been delegated to Congress to regulate interstate commerce.
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> "*Once Congress has lawfully exercised its legislative supremacy in one of its allotted fields and has not accompanied that exercise with an indication of its consent to share it with the states, the burden of overcoming the supremacy of the federal law in that field is upon any state seeking to do so.*"
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> "Where there is legislative intent to share the exclusiveness of the congressional jurisdiction, appropriate language can make that intent clear. An outstanding example of such authorization is in the Eighteenth Amendment, now repealed. It was there provided that 'The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.'" (U.S. Const.) More recently, clear language was used by Congress to insure the validity of state cooperation in the 'Migratory Bird Conservation Act," approved February 18, 1929:
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> "Sec. 17. That when any State shall, by suitable legislation, make provision adequately to enforce the

provisions of this Act and all regulations promulgated thereunder, the Secretary of Agriculture may so certify, and then and thereafter said State may cooperate with the Secretary of Agriculture in the enforcement of this Act and the regulations thereunder." 45 Stat. 1225, 16 U.S.C. Sec. 715p.

"Still closer to the present situation is the language used by the Congress that passed the Motor Carrier Act, 1935. In 'The Whaling Treaty Act' it said:

"Sec. 12. That nothing in this Act shall be construed to prevent the several States and Territories from making or enforcing laws or regulations not inconsistent with the provisions of said Convention (for the regulation of whaling) or of this Act, or from making or enforcing laws or regulations which shall give further protection to whales . . ." 49 Stat. 1248, 16 U.S.C. Sec. 912.

"The Motor Carrier Act, 1935, did not overlook the subject of exclusive state and federal jurisdiction over the respective fields of intrastate and interstate commerce touched by the Act. It did not, however, approve joint an' conflicting control by both at the same time. *It expressly vested in th eInterstate Commerce Commission the regulation of the transportation of passengers by motor carriers engaged in interstate commerce.* With equal clarity it expressly provided that Part II of the Interstate Commerce Act *should not affect the powers of taxation of the several states.* It thus dealt with and preserved to the states their full powers to tax without added restriction because of the oMtor Carrier Act's relation to interstate commerce. The state powers of taxation were thus distinguished from those of regulation because the power of regulation of interstate commerce was vested expressly in the Interstate Commerce Commission. Also, in relation to the regulation of intrastate commerce, Congress provided that nothing in Part II of the Interstate Commerce Act 'shall be construed . . . to authorize a motor carrier to do an intrastate business on the highways of any State, or to interfere with the *exclusive exercise by each State of the power of regulation*

of intrastate commerce by motor carriers on the highways thereof.' (Emphasis added). Sec. 202 (c), 49 Stat. 543, later designated Sec. 202 (b), 54 Stat. 920, 49 U.S.C. Sec. 302 (b). For full text of original Sec. 202 (b) and (c), later designated Sec. 202 (a) and (b), see Appendix B (2), *infra.*

"Congress thus dealt directly with the problem of state and federal regulation of motor carrier transportation, either interstate or intrastate in character. Congress indicated no consent to share with others its exclusive jurisdiction over the regulation of interstate commerce. If it had intended to do so, that would have been the place to express such an intent. The language used reflected not merely an absence of congressional consent to the sharing of its jurisdiction over any form of interstate commerce. On the contrary, especially when read with Sec. 203 (b) (9), it evidenced a conscious congressional dissent from any such sharing of its jurisdiction over this form of interstate commerce described in this legislation. Section 203 (b) (9) stated a positive insistence upon federal jurisdiction in the precise field which concerns us here. It provided that the federal jurisdiction become effective whenever and to the extent that the Interstate Commerce Commission found the necessity for it. In this narrow field, Congress thus expressly left temporarily on trial the substantially exclusive state regulation of interstate commerce which was already in effect. This express temporary conditional exemption created a special situation in which the consent of Congress to state regulation was to be continued or cut off by the Interstate Commerce Commission. It did not suggest any sharing or duplication of control by the Commission and the state. This temporary survival of state control was expressly and unequivocally terminated by the order of the Interstate Commerce Commission in 1942. That order called for a positive discontinuance of state control, coupled with a positive vesting of jurisdiction in the Interstate Commerce Commission over this particular type of interstate commerce. The procedure thus taken to substitute federal for state regulation of interstate commerce was the very opposite of a

procedure permissive of joint or duplicating federal and state control. It is difficult to conceive of a more deliberate and obvious substitution of one for the other. The area available for such substitution of federal for state control was clearly defined and set aside in Sec. 203 (b) (9) and then put into effect by order of the Interstate Commerce Commission. *Ex parte No. 35,* 33 M.C.C. 69 (3 Federal Carriers Cases Sec. 30, 239), 49 C. F. R. Cum. Supp. Sec. 210.1. For an example of a substitution of exclusive federal regulation for exclusive state regulation of certain interstate commerce activities in the warehousing field, see *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218."

Continuing, further, with the opinion of Mr. Justice Burton—

"This brings us to the final question of statutory interpretation. Did Congress impliedly consent to this attempted sharing of its established jurisdiction within the narrow limits of Sec. 203 (b) (9)?

* * * * * * * * * *

"It is a contradiction in terms to say that a state, without the consent of Congress, may duplicate or share in the exclusive jurisdiction of Congress. If the jurisdiction of Congress has become exclusive, the state's jurisdiction must, by hypothesis, be derived thereafter from Congress or cease to exist. In this case there was *no express consent* by Congress to share with the states the federally protected exclusive jurisdiction over this type of transaction in interstate commerce. The question remains, however, whether, under all the circumstances, Congress shall be held to have impliedly consented to share its exclusive jurisdiction with California. The text of the legislation and the course of events, which led the Federal Government to take jurisdiction, not only disclose an absence of any basis for a claim that Congress impliedly consented to the California legislation but present overwhelming evidence of a deliberate, careful and unconditional assumption by Congress of

federal jurisdiction, *consciously exclusive* of the inadequate state regulation theretofore found to exist. * * *"

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"In the instant case the most impressive material emphasizing the unwillingness of Congress to share its exclusive control with a control through state legislation is found in the legislative, administrative and judicial proceedings which led to the taking of complete jurisdiction by Congress. When federal jurisdiction was thus taken, in 1942, it was clear to Congress that there existed highly unsatisfactory state regulation of the interstate transactions in question. There is no evidence of a subsequent change in the attitude of Congress. The course of events tells the story. It suggests no consent by Congress to a duplication of federal and state control. On the other hand, it demonstrates the existence of ample reasons for taking and retaining exclusive federal jurisdiction over this kind of interstate transportation. It is an example of the effective integration of our federal and state jurisdictions when each is given exclusive control over designated activities, rather than simultaneous, dual and conflicting control over the same activities."

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"Jurisdiction over these interstate transactions was assumed by Congress after thorough investigation of the need for such action. That legislation enacted was supreme and therefore exclusive. This does not mean that it might not have been shared with the states if Congress had so provided. We believe, however, that it does mean that, in order for the federal jurisdiction to have been so shared, there must have been some express or implied consent by Congress to do so. The position of Congress was perfectly clear in 1942. There has been no evidence of a change in it."

Mr. Justice Frankfurter, in his dissenting opinion, made this very pertinent observation—

"When Congress deals with a specific evil in a specific way, subject to specified sanctions, it is not

> reasonable to require Congress to add, "and hereafter the States may not also punish for this very offense," to preclude the States from outlawing the same specific evil under different sanctions. To do so would impute to Congress the purpose of imposing upon a nation-wide rule the crazyquilt of diversity—actual and potential—in State legislation, when the federal policy was adopted by Congress precisely because it concluded that the manner in which the States, under their permissive power, dealt with the evil was unsatisfactory. Such an inference is a strained and strange way of interpreting the mind of Congress."

In the case of *Spector v. O'Connor*, 71 S. Ct. 508, decided March 26, 1951, the majority opinion of the United States Supreme Court was written by Mr. Justice Burton, and he was joined by Mr. Chief Justice Vinson, Mr. Justice Reed, Mr. Justice Frankfurter, Mr. Justice Jackson, and Mr. Justice Minton.

The case dealt with validity of a Connecticut tax imposed upon the *privilege* of operating in interstate commerce, and the following statement of the Court is pertinent—

> "Taxing power is inherent in sovereign states, yet the states of the United States have divided their taxing power between the Federal Government and themselves. They delegated to the United States the exclusive power to tax the privilege to engage in interstate commerce when they gave Congress the power 'To regulate Commerce with foreign Nations, and among the several States * * *.' U.S. Const. Art. I, Sect. 8, cl. 3. While the reach of the reserved taxing power of a state is great, *the constitutional separation of the federal and state powers makes it essential that no state be permitted to exercise, without authority from Congress, those functions which it has delegated exclusively to Congress.*"

Said case lends very recent support for the proposition that Congress must specifically authorize a state to share its power in a field which it has occupied by authority of the Constitution, and it is a reminder to the states that *they* delegated to Congress the *exclusive* power which it has in the field of legislation with respect to the operation of motor carriers in interstate commerce.

No. 722. TOM'S EXPRESS, INC. ET AL. *v.* DIVISION OF STATE HIGHWAY PATROL, DEPARTMENT OF HIGHWAYS, OF OHIO. Appeal from the United States District Court for the Southern District of Ohio. *Per Curiam:* The appeal is dismissed for the want of a substantial federal question. MR. JUSTICE REED and MR. JUSTICE DOUGLAS dissent. *Taylor C. Burneson* and *J. E. Simpson* for appellants. Reported below: —— F. Supp. ——.